

**STATE OF NEW JERSEY
DIVISION OF GAMING ENFORCEMENT
DOCKET NOS: 11-1205-RC
CREDENTIAL NO: 204442-40**

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| STATE OF NEW JERSEY, | : | |
| DEPARTMENT OF LAW & PUBLIC SAFETY, | : | |
| DIVISION OF GAMING ENFORCEMENT, | : | |
| | : | |
| COMPLAINANT, | : | |
| | : | |
| v. | : | <u>FINAL AGENCY DECISION</u> |
| | : | |
| HERBERT L. ROGERS, | : | |
| | : | |
| RESPONDENT. | : | |
| | : | |

APPEARANCES: FOR RESPONDENT:
MAURY K. CUTLER, ESQ.

**FOR THE DIVISION OF GAMING ENFORCEMENT:
BRIAN C. BISCIEGLIA, DAG**

**BEFORE: ROBERT A. MONCRIEF JR., DEPUTY ATTORNEY GENERAL
 HEARING EXAMINER**

RECORD CLOSED: June 1, 2012 DECIDED: June 13, 2012

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On July 29, 2011, the Division of Gaming Enforcement (Division) filed for revocation of the casino employee credential of Herbert L. Rogers (Respondent) alleging that he was disqualified from holding such credential under *N.J.S.A.* 5:12-86c(1) and 86g due to his alleged commission of the disqualifying offense of Sexual Assault (second degree), in violation of *N.J.S.A.* 2C:14-2c(1). The Division also alleged that Respondent is disqualified under *N.J.S.A.* 5:12-86i for failing to pay monies owed to the New Jersey Motor Vehicle Commission and the

New Jersey Division of Youth and Family Services. In response to the Division's revocation request Respondent requested an opportunity to be heard on August 18, 2011.

The Division and Respondent participated in prehearing conferences in an effort to resolve the matter. These conferences failed to result in settlement and, as a result, a hearing in the instant matter was conducted. The issues set forth for disposition are:

A. Can the Division prove by a preponderance of the evidence, pursuant to section 86g of the Act, that Respondent engaged in conduct constituting the disqualifying offense of Sexual Assault, in violation of *N.J.S.A. 2C:14-2c(1)*?

B. If so, can Respondent demonstrate by clear and convincing evidence his rehabilitation from the disqualifying conduct pursuant to section 91d of the Act?

C. If Respondent is found to be disqualified and fails to prove his rehabilitation, should good cause be found under section 106c of the Act to allow employment in a position that does not require a credential?

On October 24, 2011 Robert A. Moncrief Jr., Deputy Attorney General, was designated to preside as hearing examiner in this matter. A hearing was held on March 28, 2012. At the conclusion of the hearing, the record was left open for 14 days to afford Respondent the opportunity to produce certain character letters and to allow the Division to provide evidence relating to the monies that were alleged to have been owed by Respondent. At the conclusion of that 14 day period Respondent had submitted several character letters, and the Division was unable to provide the information relating to the fines. As a result, the record was then held open for an additional nine days. On April 20, 2012, all of the relevant information had been submitted and the record was closed. On May 22, 2012 the record was again reopened in order to allow the parties to submit evidence to show unequivocally that the charges against

Respondent, which gave rise to this matter, were in fact dismissed. Information on that issue was provided to the Hearing Examiner and the record was closed again on June 1, 2012.

FINDINGS OF FACT

As of the date of the Division's revocation request, Respondent was an unemployed 49 year old resident of Lindenwold, New Jersey. However, at the time of the hearing Respondent was working as a bartender at the Atlantic Club Casino.

Respondent was charged on April 19, 2010, with Sexual Assault (second degree), in violation of *N.J.S.A. 2C:14-2c(1)*, Burglary (second degree), in violation of *N.J.S.A. 2C:18-2*, and Contempt (fourth degree), in violation of *N.J.S.A. 2C:29-9*. Those charges were ultimately dismissed on October 26, 2010.

In order to prove the alleged disqualifying conduct the Division presented the taped statement of Respondent's spouse at the time, [REDACTED] (formerly [REDACTED]), the alleged sexual assault victim. In that statement [REDACTED] indicated that she and Respondent were married but they were in the process of a divorce and she had obtained a temporary restraining order against Respondent. [REDACTED] claimed that in the middle of the night she awoke in her bed to find her estranged husband, Respondent, in her bedroom. She further stated that before she had a chance to do anything, such as call the police, he had stripped his clothes off and began to have sex with her over her verbal objections and physical resistance. She claimed that she did physically resist him, but she did not scratch him. In her estimation [REDACTED] claimed the incident lasted eight to ten minutes. According to [REDACTED] once the assault had concluded Respondent left the residence. At that time [REDACTED] left the residence to report the incident to the police. Once the incident was initially reported to the local police

██████ was examined by a Sexual Assault Nurse Examiner and then returned to the police department to provide a taped statement. The taped statement was played at the hearing.

In addition to playing the alleged victim's taped statement various pieces of documentary evidence were provided by the Division. First, a police report taken by the Lindenwold Police Department relating to the alleged assault contains a slightly more detailed account of the allegations against Respondent. The crux of the allegations in the police report are consistent with the account given in ██████ taped statement. Second, copies of the warrants contain the charges against Respondent which were signed on April 19, 2010. Third, the Division presented print outs from New Jersey Civil Judgement and Order Docket Inquiry computer system indicating that as of April 19, 2012 Respondent owes \$1,000 to the New Jersey Motor Vehicle Commission and also \$50 to the New Jersey Division of Youth and Family Services.

The Division also presented the testimony of State Investigator ("SI") Brian Donahue. SI Donahue testified that he had interviewed Ms. ██████ on March 21, 2012. SI Donahue said the purpose of the interview was to question Ms. ██████ regarding an affidavit, dated March 19, 2012, that the Division received from Respondent's attorney in which Ms. ██████ allegedly claimed that her prior allegations that Respondent sexually assaulted her were false. SI Donahue indicated that Ms. ██████ confirmed the affidavit was genuine and stated to him that her claim that Respondent sexually assaulted was untrue and was made out of anger at Respondent. SI Donahue further testified that Ms. ██████ stated that her ex-husband, was a good guy, a good employee and should not be put out of work. In his report regarding this interview when asked what made her change her mind and withdraw the charges against Respondent he wrote that Ms. ██████ stated she was motivated by "sleepless nights, guilt and just doing what is right." SI Donahue also indicated that ██████ told him that the reason she

initially filed the charges was “anger from a woman scorned.” SI Donahue also indicated that Ms. [REDACTED] stated she was aware that it is criminal to file a false police report. She acknowledged that by filing the affidavit she was admitting that her taped statement to the Lindenwold Police Department was fabricated. According to SI Donahue’s report when asked if she stood by her affidavit Ms. [REDACTED] stated “yes.” SI Donahue further testified that [REDACTED] indicated at one time she was receiving alimony from Respondent however that stopped when he was out of work and she has yet to start collecting it again. SI Donahue’s testimony and his report memorializing his interview of Ms. [REDACTED] conclude the evidence presented in the Division’s case in chief.

Respondent presented only one document at the hearing, the affidavit of [REDACTED] [REDACTED] referred to above. In that affidavit Ms. [REDACTED] states that she falsely alleged Respondent sexually assaulted her while they were going through a divorce because at the time she was angry at her then husband. She further states that she requested the charges against Respondent be dismissed because “Mr. Rogers did not, in fact, sexually assault me.” She also states that Respondent is “a good man, and [she] truly regrets having made a false allegation” and expresses a desire for Respondent to retain his credential. There is nothing in this record that challenges the validity of the affidavit.

Respondent testified that he and Ms. [REDACTED] were married for 13 years. Respondent candidly admitted that their relationship ended poorly, evidenced by his admission that at one point he had slashed all four tires on her car out of anger in violation of a restraining order. He further admitted that despite being ordered to turn over any means of entry to the marital residence, because of the restraining order, he retained a key and used that key on April 18, 2010 to gain entry to the house. Respondent admits that on the evening of April 18, 2010 into April

19, 2010 he and Ms. [REDACTED] did in fact have sexual intercourse, but it was consensual. Respondent said that there was no conversation between the two regarding consent, rather it was something that just happened. Respondent stated that on that night he had not consumed any alcoholic beverages and there was no fighting or arguing between Ms. [REDACTED] and him. Respondent stated that after the two finished having sexual intercourse he left the residence without incident. When asked if he forced himself on Ms. [REDACTED] on the night in question Respondent stated "not really." When asked for an explanation of that answer by the Division, Respondent stated he responded that way because he had just listened to Ms. [REDACTED] taped statement in which she indicated that she was forced to have sexual intercourse. When the Division pressed further for an explanation from Respondent he indicated consent was not discussed verbally, and the course of events that night simply led them to have sexual intercourse. Respondent then reiterated that Ms. [REDACTED] didn't resist his advances. During his testimony Respondent also stated that he had completed anger management training as a result of the restraining order which was filed against him by Ms. [REDACTED]. Respondent stated that his attendance at anger management was court ordered. Respondent did not present a certificate or other documentation to support this claim however it is supported by the fact that the charges were ultimately dismissed, because that was a condition of dismissal required by the prosecutors office. Respondent further stated that on October 23, 2011 while at work his employers smelled alcoholic beverages on his breath so he was directed to attend alcohol rehabilitation to retain his job. Respondent stated that his alcohol rehabilitation program was done through outpatient treatment at Lakeside Recovery and that he still attends the program two days per week and attends group meetings three times per week.

After the hearing concluded but before the record was closed Respondent submitted five character reference letters and a print out from the New Jersey Automated Traffic System in the Lindenwold Municipal Court, the latter documenting that Respondents motor vehicle offenses are no longer pending.

The first letter submitted by Respondent is from Melchizadek Tulu who indicates they have known Respondent professionally and socially for 13 years. The writer indicates that Respondent is righteous, caring, level-headed and also claims that Tulu could never imagine him violating anyone, which presumably is a reference to the charges faced by Respondent.

The second letter submitted by Respondent is from Mr. and Mrs. Leroy Henderson. Mr. and Mrs. Henderson indicate that they have known Respondent for 15 years. They claim that during that time he has been a trusted friend and even served as the best man in their wedding. They continue to state that Respondent is dependable, honest and level-headed, however it should be noted that they do not make reference to the allegations against Respondent therefore it is unclear if they were aware of them.

The next letter is from Jeffrey Bolden who indicates he is an Investigator for BSHS in the State of New Jersey however he does not elaborate on that title or the meaning of the acronym BSHS. Mr. Bolden states he has known Respondent for over 30 years and speaks extremely highly of Respondent's character. Mr. Bolden continues to request that Respondent be given a chance to "rectify his mistakes", however he does not explain what those mistakes were, nor does he mention the alleged disqualifying conduct at issue in this matter.

Next, Respondent submitted a letter from Angela Beck. There is a notation on this letter indicating that Beck is Respondent's supervisor and she claims to have known Respondent for a period of 5 years as his coworker. Beck states that Respondent is a hard-working and

dependable employee and is also a loyal, honest and considerate individual. Like the other writers Beck speaks very highly of Respondent's character, however she fails to make mention of the prior charges faced by Respondent which gave rise to this hearing.

The final letter submitted by Respondent is from Wade Carter. Mr. Carter does not indicate exactly how long he has known Respondent although from the tone of his letter is appears to be an appreciable amount of time. Mr. Carter states that Respondent is a hard-worker and a caring person. Mr. Carter continues to state that the charges against Respondent, presumably in this proceeding, are outrageous and should be dropped so he can resume his life and casino employment. Mr. Carter indicates that he is aware of the prior charges faced by Respondent.

As stated earlier, the record in this matter was reopened by the Hearing Examiner on May 22, 2012 in order to allow the parties to submit evidence to show the charges filed against Respondent by Ms. [REDACTED] were in fact dismissed. This was done because, although there was verbal testimony tending to prove the charges were dismissed, there was no documentary or other evidence submitted which would show unequivocally that those charges were dismissed by the prosecuting entity assigned to pursue them. Furthermore, although it is certainly not dispositive that the prosecuting entity assigned to handle the charges at issue here decided to forego prosecution, that decision carries some evidentiary weight in this matter. Among the documents submitted to the Hearing Examiner was a series of printouts from the State of New Jersey court computer system which did in fact show that the charges against Respondent were administratively dismissed by the Camden County Prosecutors Office on October 26, 2010. Also submitted was a correspondence from an Assistant Prosecutor, dated July 16, 2010, to Respondent's criminal defense lawyer stating that if Respondent completes an anger

management course the charges against him would be dismissed and a correspondence from Respondent's criminal defense lawyer, dated October 26, 2010, to the prosecutors office stating that Respondent had completed anger management and the proof of that completion is attached.

After having carefully reviewed the entire record in this matter I now turn to assess the credibility of the evidence submitted. I find that although Respondent seemed candid in his testimony he was only marginally credible. When questioned by his own attorney Respondent was forthcoming and his demeanor was calm. However, when questioned by the Division or even the Hearing Examiner Respondent's demeanor seemed to change in an instant, almost as if a switch were flipped. Most troublesome regarding Respondent's testimony was when questioned by his own attorney regarding whether or not he forced himself on [REDACTED] the night of the alleged assault Respondent's answer was "not really." The natural implication to this answer is that there was some level of force used whether physical or otherwise. Respondent's explanation of "not really" being that he only used those terms because he had just listened to the alleged victim's taped statement which accused him of using force strains his credibility.

However, the credibility of the alleged victim in this matter is also very much in question. In essence, she has admitted, under oath, to filing a false police report in a very serious matter. It must also be noted that Ms. [REDACTED] did not testify in this matter and when asked by SI Donahue if she would be willing to do so her response was only if it was going to help Respondent. Thus, her credibility is also seriously in question. On one hand the Hearing Examiner is presented with a somewhat credible taped statement claiming a sexual assault occurred and on the other a valid affidavit from the victim along with her subsequent interview statements to a State Investigator from the Division that there was in fact no sexual assault committed. When these clearly contradictory claims are combined with the fact that the alleged

victim would stand to receive alimony if Respondent retains his job, giving her a financial motive to be dishonest, it is difficult to determine if any of her claims are true. In this matter only two persons, Respondent and Ms. [REDACTED] know exactly what happened on the night in question. Unfortunately neither of those individuals are very credible.

LEGAL ANALYSIS

Disqualification pursuant to *N.J.S.A. 5:12-86c(1)* and 86g

Under *N.J.S.A. 5:12-86g* if an applicant engages in conduct which would constitute a disqualifying offense under *N.J.S.A. 14-2c(1)*, such as Sexual Assault in violation of *N.J.S.A. 2C:14-2*, regardless of whether or not such conduct has been prosecuted criminally, that applicant is disqualified from licensure. Furthermore, under *N.J.S.A. 5:12-86i* an applicant is disqualified from licensure if he fails to repay any debt owed to the State of New Jersey unless the applicant provides proof to the Director's satisfaction of payment or an arrangement to make payments to satisfy the debt.

In the instant case the Division has moved to disqualify Respondent under both of the grounds set forth above. With respect to disqualification under *N.J.S.A. 5:12-86g* I find that the Division has failed to carry its burden and prove by a preponderance of the evidence that Respondent has engaged in conduct which would constitute Sexual Assault, in violation of *N.J.S.A. 2C:14-2*, which would disqualify him from licensure. I reach this conclusion after careful consideration of the facts, particularly the statements of the alleged victim, who affirmatively stated in a sworn affidavit and reconfirmed that statement in an interview with a Division Investigator, that her initial allegation was false and designed to get back at Respondent. In this matter the only evidence presented which would prove Respondent had committed the alleged conduct was the taped statement of the alleged victim. This should be

accorded special weight because it occurred immediately after the incident. However, the alleged victim's provision of a detailed statement claiming that the incident did not occur and the charges were filed to get even with him leaves us in a quandary. It is impossible to know whether [REDACTED] made up the alleged assault because she was angry at Respondent or whether she recanted her initial allegation so that Respondent could remain employed and make alimony payments. In this regard I take further notice of the fact that in her affidavit [REDACTED] states that she "truly regrets having made a false allegation" and that when being interviewed by the Division's investigator about her affidavit, [REDACTED] stated she withdrew the charges because of "sleepless nights, guilt and just doing what is right." I am also mindful of the fact that the Camden County Prosecutors Office after reviewing the evidence made a determination to dismiss the criminal charges in their entirety on the condition that Respondent complete an anger management course. When the taped statement is weighed against an affidavit from the alleged victim stating the criminal charges were filed falsely, the fact that the criminal charges were dismissed in their entirety by the prosecutors office, and the Division's own State Investigator's testimony regarding the alleged victim's statements that the charges were falsely filed, I am constrained to conclude that the Division failed to carry its burden and prove that Respondent is disqualified under *N.J.S.A. 5:12-86g*.

The next ground for disqualification advanced by the Division is that Respondent is disqualified under *N.J.S.A. 5:12-86i* for his failure to repay a debt owed to the State of New Jersey and/or has failed to show proof of an arrangement to pay such debt. More specifically the Division presented evidence that as of April 19, 2012 Respondent owes \$1,000 to the New Jersey Motor Vehicle Commission and also \$50 to the New Jersey Division of Youth and Family Services. Respondent presented a print out from the Lindenwold Municipal Court indicating that

his motor vehicle charges have been disposed of, however there is no indication that the fines relating to these charges have been satisfied or any reference to the \$50 Respondent allegedly owes to the New Jersey Division of Youth and Family Services. In evaluating this evidence I conclude that the Division has proven through the presentation of credible documentary evidence that as of April 19, 2012 Respondent does owe \$50 to the New Jersey Division of Youth and Family Services and \$1,000 to the New Jersey Motor Vehicle Commission. I further conclude that because Respondent has not presented proof that he has either satisfied these debts or made arrangements to pay them he is disqualified from licensure under *N.J.S.A. 5:12-86(i)*. Notwithstanding the above I will provide the Respondent with 30 days from the date of this decision to either provide the Division with proof that the debts are satisfied or that he has entered into an arrangement to repay the debts within a reasonable period of time. If such action is not taken an order will be entered revoking Respondent's credential until such arrangements are made.

In conclusion, this case leaves this decision maker quite unsettled. While certain evidence points to the commission of a deplorable act, the affirmative statements and actions by the alleged victim can only lead to one legal conclusion; the Division failed to sustain its burden in proving that a sexual assault actually occurred.

Rehabilitation pursuant to *N.J.S.A. 5:12-91d* and

Good Cause pursuant to *N.J.S.A. 5:12-106c*

Because I have failed to find that Respondent has committed disqualifying conduct under *N.J.S.A. 5:12-86g* and his credential is not disqualified on those grounds it is unnecessary to explore the questions of rehabilitation or good cause under *N.J.S.A. 5:12-91d* and *5:12-106c*, respectively.

DISPOSITION

IT IS ORDERED that the request by the Division to revoke Respondent's casino employee credential is **DENIED**;

IT IS FURTHER ORDERED that Respondent has 30 days from the date of this decision to provide the Division with proof that he has either satisfied or made arrangement to satisfy his debts of \$50 to the New Jersey Division of Youth and Family Services and \$1,000 to the New Jersey Motor Vehicle Commission;

IT IS FURTHER ORDERED that if Respondent has failed to either satisfy the debts listed above, or make arrangements to satisfy them, his casino employee credential shall be automatically revoked without any further proceedings until such arrangements are made.

I hereby file my Decision as the determination by the Director of the Division of Gaming Enforcement pursuant to *N.J.S.A. 5:12-76f*.

Any party may appeal this Decision to the Casino Control Commission within 30 days of the date of its service on the parties.

June 13, 2012
Date

David L. Rebuck
David L. Rebuck
Director

Mailed to the parties by:

June 13, 2012
Date

[Signature]